No. 9685

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WILLIAM A. CARMICHAEL, District Director of the United States Immigration and Naturalization Service, Los Angeles, California, District No. 20,

Appellant,

vs.

WONG CHOON OCK,

Appellee.

APPELLANT'S OPENING BRIEF.

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Opening Statement.

This is an appeal from an order discharging Wong Choon Ock from the custody of the United States Immigration and Naturalization Service [R. 9-11]. The appellee Wong Choon Ock, having been denied admission into the United States, petitioned the lower court for a writ of habeus corpus to test the legality of his detention by appellant. The jurisdiction of the court below to entertain and consider such a writ is found in provisions of 28 U. S. C., section 45 (R. S., sec. 751). The juris-

diction of this Court on the appeal is based on the provisions of 28 U. S. C. 225-A (Jud. Code 128 as amended).

By stipulation and order [R. 13] certain original files of the United States Immigration and Naturalization Service which comprise the entire record upon which the excluding order was made have been filed with the clerk of this court as part of the appellate record. The certified file of the Department of Labor, No. 56007/819, will be hereinafter called the "Immigration Record." It contains the original transcript of the hearing at San Pedro, California, the various exhibits introduced, the summary, and the recommendation of the Board of Review in Washington, D. C., and the action of the Secretary of Labor on appeal.

Facts of the Case.

Wong Choon Ock, hereinafter called "applicant," admittedly was born in China and is a person of the Chinese race. He came to the port of San Pedro, California, from China, June 25, 1939, accompanied by his alleged mother, Chin King Nue (Chin Shee), an alleged younger brother, Wong Choon Loy, and his alleged father, Wong Quan; and applied for admission to the United States, claiming to be the foreign-born son of Wong Quan, a native-born citizen of the United States. The United States citizenship of the said Wong Quan is conceded and is therefore not at issue.

The admissibility of the applicant, his alleged younger brother, Wong Choon Loy and his alleged mother, Chin King Nue, was considered by a Board of Special Inquiry duly appointed under section 17 of the Immigration Act of 1917 (8 U. S. C. A., 153). After a hearing the Board voted to admit to the United States the said alleged mother and younger brother, but denied admission to the applicant, Wong Choon Ock, for the reason that it had not been established to the satisfaction of said Board that he was the son of Wong Quan. An appeal from the excluding decision was taken to the Secretary of Labor. On the appeal the applicant was represented by a lawyer residing in Washington, D. C. The decision of the San Pedro Board was affirmed. The Secretary directed that the applicant be returned to China at the expense of the steamship company which brought him here. Appellant was about to return the applicant to China when a writ of habeas corpus was issued. After a hearing on the matter, the District Court entered an order discharging the alien from custody of the appellant [R. 10]. From that order this appeal is taken.

Question at Issue.

In his memorandum decision of July 1, 1940 [R. 9], the District Court said:

> "No notice whatever was given to the applicant of the production of Dr. Kading as a witness and no opportunity afforded for cross-examination of this expert on behalf of the applicant, nor was applicant given any opportunity to produce witnesses to contravert the testimony of Dr. Kading.
>
> "Such proceeding is manifestly unfair, particularly since in reaching its decision the Immigration Department has disregarded the competent and uncontradicted testimony of eye-witnesses as to the date of nativity and parentage of applicant."

It appears from the District Court's opinion, granting the petition for a writ of habeas corpus and discharging Wong Choon Ock from the custody of the Immigration authorities that, succinctly stated, the court regarded the hearing in this case to be unfair solely because the applicant was not permitted to be represented by counsel before the Board of Special Inquiry. Therefore, while there are five assignments of error relied upon by appellant [R. 14], there is but one issue before this Honorable Court:

WAS THE APPLICANT ACCORDED A FAIR HEARING?

Or specifically:

DID DENIAL OF REPRESENTATION BY COUNSEL AT THE IMMIGRATION HEARING RENDER THE HEARING UNFAIR?

Argument.

The immigration authorities decided the citizenship status of the applicant. This was primarily a question of fact and was decided adversely to the applicant by a regularly constituted administrative board authorized by law to consider and decide such a question of fact. It is well established that if the immigration authorities considered the applicant's claim for admission at a fair hearing and gave him a reasonable opportunity to establish his citizenship and, in so doing, did not abuse the discretion lodged with them, their finding of fact upon the question of citizenship is conclusive:

Quon Quon Poy v. Johnson (1927), 273 U. S. 352;

Weedin v. Yee Wing Soon (C. C. A. 9, 1931), 48 Fed. (2d) 36.

Appellant submits that the hearing resulting in the applicant's exclusion was fair and that it conformed to the requirements of "due process." The applicant was born in China and is of the Chinese race. He arrived in the United States for the first time without documentary proof of his claimed United States citizenship. The matter rested upon a question of fact, *i. e.,* whether applicant was the foreign-born son of Wong Quan, who concededly is a United States citizen. On this question the burden of proof was upon the applicant:

Mui Sam Hun v. United States (C. C. A. 9, 1935), 78 Fed. (2d) 612, 613;

United States v. Day (C. C. A. 3, 1932), 54 Fed. (2d) 990, 991;

Lum Sha You v. United States (C. C. A. 9, 1936), 82 Fed. (2d) 83, 84;

Woon Sun Seung v. Proctor (C. C. A. 9, 1938), 99 Fed. (2d) 285;

Jung Yen Loy v. Cahill (C. C. A. 9, 1936), 81 Fed. (2d) 809.

At the time of his arrival at San Pedro on June 25, 1939, the applicant claimed to be approximately 8 years and 7 months old. He appeared to the Board members to be much older [see p. 16, Q. 151, Immigration Record]. This opinion of these Board members based upon his physical appearance, should not be considered remarkable after examining the photographs of applicant and his alleged brother, Wong Choon Loy, which were introduced in evidence at the Board hearing, marked Exhibits "E" and "F." Wong Choon Loy, applicant's alleged brother, is seven years and three months old and applicant claims to be 8 years, 7 months old, a difference of one year and four months. Nevertheless, the photographs show the applicant to be practically twice as tall as his alleged brother. In view of this discrepancy the Board called in medical officers of the United States Public Health Service for a medical opinion as to his age. Dr. Harold M. Graning, assistant surgeon, made an exhaustive physical examination of the applicant and Dr. Albert Allen, roentgenologicalist, took several x-ray photographs of him. Dr. Graning submitted a detailed report and analysis of his examination, which report included the findings of Dr. Allen. Dr. Graning's conclusion was that the applicant's true age ranged between 11 and 13 years. Basing his opinion on x-rays of the bony structure, Dr. Allen reported that the applicant was 13 years of age.

On July 31, 1931, at the request of applicant's representative, the hearing before the Board of Special In-

quiry was reopened by order of the Los Angeles District Director to permit the introduction of the testimony of a physician, Dr. F. McLean Campbell, privately employed by the applicant. It is interesting to note the following testimony *given by the applicant's medical witness* [Immigration Record, p. 32]:

> "263. Q. After giving him [applicant] the examination you thought necessary, what conclusion did you arrive at?
>
> A. *That he was at least the age of ten years.*" (Emphasis ours.)

If this is taken as the correct age it would place the applicant's birth at about July of 1929. But we have the alleged father's testimony that the date he and his wife left the United States was July 17, 1929. Consequently, they would not arrive in China until some time in August. This same witness, testifying in behalf of the applicant, also gave the following testimony [Immigration Record, p. 32]:

> "270. Q. Doctor, the applicant, Wong Choon Ock, claims birth on November 20, 1930, which would make him 8 years and 7 months on June 20, 1939, do you think it at all likely that he could be that age?
>
> A. *No, that is rediculous on account of the permanent teeth which he has now and the epiphyseal marks in the x-rays as shown.*" (Emphasis ours.)

Dr. Campbell's letter to Mr. Richard H. Taylor, local representative of applicant, is a part of the Board record, marked Exhibit "G." It will be noted he wrote to Mr. Taylor in part as follows:

> "* * * I'm very sorry but the boy is at least 10 years old * * *."

Thus, the Board's opinion of the boy's age based on the opinion of the Board members as to his external physical appearance in size, is supported by the evidence of Drs. Graning and Allen that he was from 11 to 13 years of age and that of the applicant's witness, Dr. Campbell, that he was "*at least* ten years old." The applicant appealed to the Secretary of Labor from the Board's decision and the record was forwarded to Washington where the Board of Review recommended that the case be reopened "in order to afford opportunity for the consideration of such further evidence as may be presented by the United States Public Health Service as to the applicant's age."

The recommendation of the Board of Review was followed and on November 22, 1939, the hearing was again reopened and testimony of Dr. Earl C. Kading was heard by the Board of Special Inquiry at San Pedro, California. Dr. Kading, a physician of 20 years' experience, testified he had examined Chinese aliens since May of 1927 at the immigration hospital at Angel Island, California, and during that time the number of Chinese examined would run into the thousands; that he had examined at least 500 Chinese for the purpose of estimating their age. Dr. Kading's report was made a part of the record and marked Exhibit "I" [Immigration Record]. He was of the opinion the applicant was between 13 and 15 years of age. The Board again decided that the applicant was not the son of Wong Quan and therefore not a citizen of the United States, and voted unanimously to deny him admission to this country. From this decision applicant again appealed but his appeal was dismissed by the Secretary. Both locally and at Washington, the applicant was represented by counsel and briefs were filed in his behalf on both appeals.

So we have the opinion of four physicians that the applicant is older than eight years and seven months, which he claimed was his correct age on June 25, 1939. The lowest estimate of his correct age is given by his own witness, Dr. Campbell, *that he is at least 10 years of age.* It should be borne in mind that Dr. Campbell's testimony to this effect was given July 31, 1939, and if the applicant's tenth birthday occurred on that date he could not very well be the child of his alleged parents as they did not arrive in China until the middle of August, 1929.

The age discrepancy has been definitely established. The issue is one of fact and hence one for the determination of the immigration authorities. There is no better established rule than that where the issue rests upon a question of fact the administrative decision is not subject to attack, unless it affirmatively appears that it could not have been reasonably reached by a fair-minded man. See:

Weedin v. Chin Share Jung (C. C. A. 9, 1933), 62 Fed. (2d) 569, 570;

Tisi v. Tod, 264 U. S. 131;

Vajtauer v. Commissioner (1924), 273 U. S. 103, 106;

Jun Yen Loy v. Cahill (C. C. A. 9, 1936), 81 Fed. (2d) 809;

Chin Chung v. Nagle (C. C. A. 9, 1931), 51 Fed. (2d) 64;

Haff v. Der Yam Min (C. C. A. 9, 1934), 68 Fed. (2d) 626.

The recent case of:

Hom Ark v. United States (C. C. A. 9), 105 Fed.

(2d) 607, decided July 11, 1939, determines and controls all the issues involved in the case at bar. That case, likewise, involved a foreign-born Chinese applying for admission as a citizen. The age of the applicant was at issue. He claimed to have been born February 22, 1921, thus making him 17 years, 2 months and 20 days old when examined for admission. In this he was supported by the oral testimony of his alleged father. The medical officers of the United States Public Health issued a certificate stating that the applicant was at least twenty years of age. They based their opinion on x-rays of the humerous showing the union of the lateral and medial epicondyles; the union of the trochlea and capitellum, and the fusion of the upper and lower epiphyses with the body. The applicant was then examined by his own privately employed physician who testified from his examination that the applicant was no more than 17 years of age. There was therefore a sharp conflict of medical opinion. No further evidence was taken and the Board of Special Inquiry concluded the applicant was born prior to February 8, 1921, and that, therefore, he was not a citizen of the United States. Our District and Circuit Courts both sustained the findings of the immigration authorities. In writing the unanimous opinion for the Circuit Court of Appeals, Ninth Circuit, in the *Hom Ark* case, Judge Matthews says in part:

> "X-ray pictures are not, of course, an infallible means of determining age. No one claims that they are. Nevertheless, to a medical expert, such pictures may be a valuable aid in arriving at an opinion of that subject. Such was the use which Drs. Smith and Evans (U. S. Public Health Service Surgeons) made of the pictures taken by Dr. Allen.

"The qualifications of Drs. Smith and Evans were not challenged, nor was their testimony objected to. *Their testimony was, to be sure, opinion testimony, but is not incompetent or otherwise improper. What weight it should be given was for the board to determine. We cannot review that determination nor substitute our judgment for that of the board.* Wong Fook Ngoey v. Nagle (9 CCA) 300 F. 323; Fong Lim v. Nagle, 9 Cir., 2 F. (2d) 971; Young Fat v. Nagle, 9 Cir. 3 F. (2d) 439; Tom Him v. Nagle, 9 Cir., 27 F. (2d) 885; Low Git Cheung v. Nagle, 9 Cir., 36 F. (2d) 452." (Emphasis ours.)

No two cases could be more similar on the facts or to the law. In our opinion, it determines all the issues presented here. It is clear that when the age of a person becomes an issue and the person is present before the triers of the fact, it can hardly be doubted that they are at liberty to use their senses and to draw conclusions as to the person's age from his physical appearance (*Wigmore Evid.* (2d Ed.) 222; *Wong Fook Ngoey v. Nagle* (C. C. A. 9), 300 Fed. 323). It is true that such inference cannot always be drawn with accuracy, but when such inference is supported by the testimony of expert medical witnesses, it cannot be said, as a matter of law, that the record does not present some evidence in contradiction of the testimony of the applicant and his witnesses. Our Circuit Court has repeatedly accepted proof by physicians certificate in similar cases:

Wong Fook Ngoey v. Nagle, supra;

Fong Lim v. Nagle (C. C. A. 9, 1925), 2 Fed. (2d) 971;

Young Fat v. Nagle (C. C. A. 9, 1925), 3 Fed. (2d) 439;

Tom Hing v. Nagle (C. C. A. 9, 1928), 27 Fed. (2d) 885;

Lew Git Cheung v. Nagle (C. C. A. 9, 1929), 36 Fed. (2d) 452.

In none of the above cited cases was the applicant represented by counsel before the Board of Special Inquiry. This was in accord with Rule 12 of the Immigration and Naturalization Service, which prohibits the presence of participation of counsel in exclusion hearings before a Board of Special Inquiry. We submit that to nullify this rule would have a most detrimental effect on enforcement of the immigration laws. It would seriously hamper administration of such laws by permitting thousands of immigrants to demand judicial hearings on their right to enter the United States when called for a hearing before the administrative boards.

It will be observed that this case involves an exclusion proceeding and not a deportation proceeding. Not only the administrative rules of the Immigration and Naturalization Service, which were promulgated pursuant to the immigration laws, are different in exclusion cases and deportation cases, but the rules and principles of law involved also differ. The pertinent question in the case at bar is whether there is authority under the immigration laws to promulgate Rule 12 of the Immigration Rules and whether Rule 12 and Rule 19 of the Immigration Rules, when they are construed together, show an unfair discrimination against an applicant for entry into the United States in favor of an alien who is to be deported from the United States.

The following provisions of Rule 12 pertain to the question involved in the case at bar:

"Rule 12—Examination of Applicants by Boards of Special Inquiry.

* * * * * * * * *

Subdivision B.—Hearings.

"Paragraph 1.—Boards of special inquiry shall determine all cases as promptly as circumstances permit, in the estimation of the immigration official in charge, due regard being had to the necessity of giving the alien a fair hearing. Hearings before the boards 'shall be separate and apart from the public'; but the alien may have one friend or relative present after the preliminary part of the hearing has been completed; *provided*, first, that such friend or relative is not and will not be employed by him as counsel or attorney; second, that if a witness, he has already completed the giving of his testimony; third, that he is not the agent or a representative at an immigration station of an immigration aid or other similar society or organization; and, fourth, that he is either actually related to or an acquaintance of the alien.

* * * * * * * * *

Subdivision E.—Excluded Alien Informed of Rights.

"Paragraph 1.—An excluded alien shall be informed that the return voyage is at the expense of the transportation company which brought him; that such transportation company must return him in the same class in which he came. The fact that he has been so informed shall be entered in the minutes.

"Paragraph 2.—Where an alien is excluded by a board of special inquiry he shall be advised of the decision of said board and the reason therefor, and when entitled to appeal to the Secretary of Labor, he shall be so advised, provided that the exact language employed in advising alien of his right to appeal, together with a full and accurate transcript of alien's reply, shall be inserted in the record and made a part thereof."

Rule 12 of the Immigration Rules was promulgated pursuant to section 17 of the Act of February 5, 1917, which prescribes the function of boards of special inquiry in the following language:

"That boards of special inquiry shall be appointed by the commissioner of immigration and naturalization or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant and naturalization officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Secretary of Labor, shall from time to time designated as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor; such boards shall keep a complete permanent record of their proceedings, and of all such testimony as may be produced before them; and the de-

cisions of any two members of the board shall prevail, but either the alien or any dissenting member of said board may appeal through the Commissioner of Immigration and Naturalization at the port of arrival, and the Commissioner of Immigration and Naturalization to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the Commissioner of Immigration and Naturalization at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor * * *." (39 Stat. 887; 8 U. S. Code, sec. 153.)

It should be observed that Rule 12, *supra,* is applicable to all persons seeking admission to the United States. It governs exclusion hearings and does not purport to deal with the rights of alleged aliens found in this country and who have been apprehended under warrant of arrest. Rights of persons subject to deportation proceedings are determined under the provisions of Rule 19 of the Immigration Rules, which provides:

"Subdivision D.—Execution of Warrants of Arrest and Hearings Thereon.

* * * * * * * * *

"Paragraph 2.—At the hearing under the warrant of arrest the alien shall be allowed to inspect the warrant of arrest and shall be advised that he may be

represented by counsel. The alien shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the conduct of the hearing and to offer evidence to meet any evidence presented or adduced by the Government. Objections of counsel shall be entered on the record, but the reasons for such objections shall be presented in accompanying briefs. If, during the hearing, it shall appear to the examining inspector that there exists a reason additional to those stated in the warrant of arrest why the alien is in the country in violation of law, the alien shall be notified that such additional charge will be placed against him and shall be given an opportunity to show cause why he should not be deported therefor."

Rule 19, *supra,* applies only to proceedings to deport a resident alien and was made within the purview of section 19 of the Act of February 5, 1917 (39 Stat. 889; 8 U. S. Code, sec. 155). It has no application whatever to the examination of persons before boards of special inquiry in exclusion proceedings.

Rule 12 and Rule 19 of the Immigration Rules and Regulations are not lacking in uniformity. They apply impartially and without exception to the respective classes of persons to which they are addressed and meet the test of uniform application of statutes.

Head Money Cases (1884), 112 U. S. 580, 594;

Florida v. Mellon, Secy. of the Treasury, et al. (1926), 273 U. S. 12, 17.

No higher test should be applied to rules promulgated under the provisions of the statute than would be applied to the statute itself. It may be granted that these rules discriminate in favor of the resident alien. The resident alien who is the subject of deportation proceedings is taken into custody on a warrant of arrest and is allowed counsel in a *quasi*-judicial hearing, whereas the immigrant who, in contemplation of law, is without the United States and seeking admission, has his rights determined in a summary proceeding without benefit of counsel before the administrative board. Rule 19, *supra,* was made pursuant to section 19 of the Act of February 5, 1917, which outlines no particular procedure to be allowed except that, after enumerating the classes which are subject to deportation, it states that they shall, on warrant of the Secretary of Labor, be taken into custody and deported. On the contrary, in section 17 of the Act of February 5, 1917 (8 U. S. C. A. 153), which concerns the proceedings to be had by boards of special inquiry where persons are without the country and applying for admission, the Congress has provided very carefully for the constitution of examining boards and their procedure. It follows that any distinction between resident aliens and persons seeking admission to the United States is made by act of the Congress. Since the Immigration Rules and Regulations are not contrary to the provisions of the statute under which they were framed, the attack is not on the rules but really is addressed to the statute.

At this point, it is well to consider the reason for the distinction made by the statute and the pertinent rules. The District Court's decision that the denial of counsel before the Board of Special Inquiry constituted an unfair hearing is tantamount to saying that Wong Choon Ock

was denied due process of law. The due process clauses of the Constitution apply to aliens resident within the country as well as resident citizens.

The Japanese Immigrant Case (1903), 189 U. S. 86;

Yick Wo v. Hopkins (1885), 118 U. S. 356, 369;

Fong Yue Ting v. United States (1893), 149 U. S. 698, 724;

Ng Fong Ho v. White (1922), 259 U. S. 278, 282-285;

United States ex rel. Bilokumsky v. Tod (1923), 263 U. S. 149, 152-155.

However, this guarantee does not extend to those persons who are not resident in the United States or within its jurisdiction, even though they are citizens of the United States.

Balsacc v. People of Porto Rico (1922), 259 U. S. 298;

Neely v. Henkel (1901), 180 U. S. 109, 122-123;

Ng Fong Ho v. White, supra.

Applicants for admission to the United States are, in contemplation of law, without a country and seeking to enter this country. The Congress has plenary power to exclude any or all aliens with or without any reason and to apply such conditions to their admission to the United States as it sees fit. The applicant for admission to this country can invoke only such rights as the Congress has seen fit by statute to confer upon him.

Nishimura Ekiu v. United States (1892), 142 U. S. 651.

Due process of law in respect to a resident alien is that which is required not only by the statute but by the Constitution, for if the statute fails to provide for such hearing as fairly may be considered to be within the meaning of due process of law as used by the Constitution, he may appeal over the statute to his constitutional rights. However, due process of law is satisfied in respect to applicants for admission into the country, who obviously are not within the country, when there has been a fair compliance with the statute alone.

Low Wah Suey v. Backus (1912), 225 U. S. 460;

United States v. Sing Tuck (1904), 194 U. S. 161;

Chin Yow v. United States (1908), 208 U. S. 8, 12;

United States v. Ju Toy (1905), 198 U. S. 253, 262-263;

United States ex rel Dong Yick Yuen v. Dunton (C. C. A. 2, 1924), 297 Fed. 447, 449.

Although the applicant for admission asserts citizenship in the United States, the primary investigation by the administrative officer is to determine whether applicant's claim is well-founded.

United States v. Sing Tuck, supra;

Quon Quon Poy v. Johnson (1927), 273 U. S. 352, 358.

The decisions uniformly hold that due process of law has been accorded to an applicant for admission to the United States where a hearing has been conducted in compliance with the statute. *Chin Yow v. United States, supra.* It is an attribute of sovereignty that a nation has the arbi-

trary right to exclude all aliens. The right to regulate the admission of aliens is a corrolary of the right to exclude absolutely. Both the power of exclusion and the power of regulation are plenary. The immigration powers are vested in the Congress, which may designate the agencies to effectuate its adopted policies. The only check on the designated agency is that it must not transcend its designated authority or abuse its discretion. As long as such designated agency operates within the limits of its authority and does not abuse its discretion, the courts may not interfere.

The Japanese Immigrant Case, supra;

United States ex rel. Barlin v. Rodgers (C. C. A. 3, 1911), 191 Fed. 970;

Choy Gum v. Backus (C. C. A. 9, 1915), 233 Fed. 487;

White v. Kwock Sue Lum (C. C. A. 9, 1923), 291 Fed. 732;

United States ex rel. Ciccerelli v. Curran (C. C. A. 2, 1926), 12 Fed. (2d) 394.

In *The Japanese Immigrant Case, supra,* Justice Harlan, speaking for the Supreme Court, said (pp. 97-99):

> "The constitutionality of the legislation in question, in its general aspect, is no longer open to discussion in this court. That Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; establish regulations for sending out of the country such aliens as come here in violation of law; and commit the en-

forcement of such provisions, conditions, and regulations exclusively to executive officers, without judicial intervention, are principles firmly established by the decisions of this court. *Nishimura Ekiu v. United States,* 142 U. S. 651; *Fong Yue Ting v. United States,* 149 U. S. 698; *Lem Moon Sing v. United States,* 158 U. S. 358; *Wong Wing v. United States,* 163 U. S. 228; *Fok Yung Yo v. United States,* 185 U. S. 296, 305.

"* * * It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the National Government. As to such persons, the decisions of executive or administrative officers, acting within the powers expressly conferred by Congress, are due process of law. *Murray v. Hoboken Co.,* 18 How. 272; *Hilton v. Merritt,* 110 U. S. 97.

"In *Lem Moon Sing's* case it was said: 'The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come into this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications.' And, in *Fok Yung Yo's* case, the latest one in this court, it was said: 'Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country."

The Congress has seen fit to place the burden of enforcement of its immigration policy upon the executive branch of the Government. It could have clothed the judiciary with the duty of enforcing the immigration laws. However, the Congress did not see fit to confer such jurisdiction on the courts. It is the sole function of the courts, when they are appealed to, to determine whether a fair summary hearing has been accorded to an alleged alien when he is taken before an administrative board to determine his right to enter the United States. If an alien is found within the confines of this country and claims to be a citizen of the United States, the hearing afforded to him under the immigration laws and regulations is of a more formal nature.

A distinction between the rights of an alien found in the country and who is subject to deportation proceedings and the rights of an alien seeking admission to the country and who is the subject of exclusion proceedings was recognized in *United States et al. v. Woo Jan* (1918), 245 U. S. 552. The Supreme Court held that the rights of a person in the United States and the rights of one seeking to enter are identical in that in the first instance there should be a judicial determination of the rights of the alleged alien, and in the second instance the matter is subject to executive action.

White v. Chin Fong (1920), 253 U. S. 90;

United States v. Ju Toy, supra;

Pearson v. Williams (1906), 202 U. S. 281;

United States ex rel. Ciccerelli v. Curran, supra;

Ex parte Wong Yee Toon (D. C. Maryland, 1915), 227 Fed. 247, 251.

The executive branch of the Government, charged with enforcement of the immigration laws and authorized by act of the Congress to promulgate rules to assist in such enforcement, also has distinguished between the rights of an alleged alien who seeks to enter the country and the rights of an alleged alien who is found within its confines.

When one seeks to enter the United States, he is given a preliminary examination by an immigration inspector. If his right to enter the country is not clear, he then is accorded a hearing before a Board of Special Inquiry. The hearings before such boards are governed by Rule 12 of the Immigration Rules and Regulations of January 1, 1930, as amended. Section 17 of the Act of February 5, 1917, *supra,* provides that "all hearings before such boards shall be separate and apart from the public, but the immigrant may have one friend or relative present under such regulations as may be prescribed by the Secretary of Labor." When one is found within the borders of this country and is sought to be deported as an alien without right to remain, a warrant of arrest is issued by the Secretary of Labor and the alleged alien is given a hearing pursuant to Rule 19 of the Immigration Rules and Regulations of January 1, 1930, as amended. Under Rule 19, it is mandatory that, at the hearing held before the authority named in the warrant of arrest, the warrant shall be submitted to the alien for his inspection and he shall be informed of his right to be represented by counsel. If the alleged alien desires the assistance of counsel, such counsel then is permitted to be present during the hearing and to safeguard the legal rights of his client. In promulgating the two rules under which the procedure is so diverse, the executive officers charged with enforcement of the immigration laws have defined a fixed policy. They

have buttressed the provisions of Rule 12 that the alleged alien may have a friend or relative present by stipulating that such friend or relative is not and will not be employed by the alien as his attorney. Under Rule 19, the alleged alien found in the United States and subject to deportation proceedings is permitted the privilege of counsel on the hearing. Under Rule 12, counsel is prohibited. The reason for the difference in procedure is clear.

If an alleged alien has been domiciled in the United States or a resident therein for many years, having an established business, home and family, and an immigration official seeks his deportation on any ground prescribed by law, safeguards should be provided to protect the rights of such alien, especially if he claims citizenship. In such instances, no immediate hearing is necessary, and such hearing should be *quasi*-judicial in nature. However, when an alleged alien seeks admission to this country, the hearing concerning his right to admission, of necessity, must be summary in character. Under normal circumstances, a great number of applicants present themselves daily for admission to the United States. If they are not entitled to admission, the law requires the transportation company which brought them here to carry them back to the point of embarkation. They have no inalienable right to enter the United States. Permission to enter this country is a matter of grace. No complaint should be entertained if such applicants are afforded a reasonable opportunity before an unbiased board of disinterested officials to establish a right to admission within the purview of the law. Pursuant to the authority found in the Act of February 5, 1917 (8 U. S. C. A. 153), to prescribe rules and conditions under which a friend or

relative may be present at a hearing before a board of special inquiry in an exclusion proceeding, the Department of Labor has seen fit, on account of the exigencies and necessities of expeditiously handling the usual influx of immigrants, to provide that the action of immigration officials in these exclusion proceedings should be unhampered by rules of court procedure and technical and casuistic contentions of lawyers. Referring to the function of a board of special inquiry in an immigration case, Justice McKenna, speaking for the Supreme Court in *Tulsidas v. Insular Collector of Customs* (1923), 262 U. S. 258, said (p. 263):

> "It would seem, therefore, as if something more is necessary to justify review than the basis of a dispute. The law is in administration of a policy which, while it confers a privilege, is concerned to preserve it from abuse and, therefore, has appointed officers to determine the conditions of it, and speedily determine them, and on practical considerations, not to subject them to litigatious controversies, and disputable, if not finical, distinctions."

However, if the alleged alien is dissatisfied with a ruling of a board of special inquiry in an exclusion proceeding, or if any member of the board itself concludes that justice has not been meted out, there is provision for an appeal. If the case is plain and the facts are indisputable, the board of special inquiry is capable of deciding whether the alien is entitled to enter this country. Where the matter is complicated, an appeal may be taken and then the alleged alien may procure the assistance of counsel who has the right to examine the record and to prepare and conduct such appeal.

There is no doubt that the Department, acting under the provisions of the immigration laws, has authority to establish rules of procedure. The question is whether the established rule is reasonable or unreasonable. It must be reiterated that the alleged alien has no inalienable rights in the premises and that all that is accorded him is by way of grace. Even if he were a citizen of the United States, it would not be his constitutional right to be heard by counsel before an administrative tribunal. The Sixth Amendment to the Constitution guarantees the right of assistance of counsel only in criminal prosecutions. No act of the Congress conferring a legal right to representation by counsel is to be found in the statute books. In *Anderson v. Treat* (1898), 172 U. S. 24, the right to personal counsel, even in a criminal case, was restricted. Anderson, who was under sentence of death, sought relief in habeas corpus proceedings on the ground that he had been assigned counsel by the court on his trial and that later he had employed other counsel who was denied permission to see the petitioner for consultation. Relief was denied by the Supreme Court. It has been pointed out that on a hearing before a board of special inquiry in an exclusion proceeding, the rules of the Immigration and Naturalization Service specifically prohibit the appearance of counsel. The question then arises: Where does the right to counsel claimed by the petitioner in this case, Wong Choon Ock, spring from?

The law reports contain many cases bearing upon the construction and operation of Rule 19, *supra*, which is applicable only to deportation proceedings. Such authorities hold that Rule 19 must be liberally construed and strictly adhered to. Any deportation proceedings will be rendered unfair if the warrant of arrest is not sub-

mitted to the lien for inspection and he is not accorded the right of counsel during the entire hearing before the Board of Special Inquiry. There are a number of cases dealing with Rule 12, *supra,* which is applicable only to exclusion proceedings. The immigration authorities and the courts have taken it as a premise that, because of the necessity for a speedy hearing before an administrative board, the departmental regulation prohibiting counsel at the hearing before a board of special inquiry in an exclusion proceeding is reasonable. The cases in direct point justify Rule 12 (formerly Rule 11), *supra,* and hold it to be reasonable. While the admission and deportation of Chinese persons is governed by a separate legislative enactment, the same distinction is made in the handling of Chinese immigrants who seek admission and Chinese aliens who are the subjects of deportation proceedings after a stay in this country as that which is found in the general immigration Act. Under the provision of the Chinese Exclusion Act (Act of May 5, 1892; 27 Stat. 25; 8 U. S. Code, section 284), the burden is on the Chinese person to establish citizenship. Clearly, this rule regarding the burden of establishing citizenship is one of evidence relating to the sufficiency thereof and does not bear on the fairness of the hearing or the reasonableness of the rule prohibiting counsel at the hearing before a board of special inquiry in an exclusion proceedings. When a Chinese person applies for admission to the United States, his right to enter this country is weighed at a summary hearing. If he is already within this country, he can be excluded only after a judicial hearing.

In the case of *In re Can Pon et al.* (C. C. A. 9, 1909), 168 Fed. 479, Justice Gilbert, speaking to this point, said (p. 483):

> "In approaching the question whether upon the record in this case the applicant for admission to the United States was denied such a hearing as the statute contemplates, we must find our guiding principles in the construction which the Supreme Court has placed upon the law in the Ju Toy case and the Chin Yow case. * * * In brief, it is the doctrine of these two decisions that an applicant for admission to the United States, detained upon the border thereof by the officials of the Department of Commerce and Labor, is not deprived of his liberty without due process of law if his rights are determined without a judicial trial, and that the decision of the officers is due process of law, with this limitation, that such officers must grant a hearing in good faith, something more than the semblance of a hearing, and must take the testimony pertinent to the questions involved of such witnesses as may be suggested by the applicant. *This does not mean, and the decisions cannot be construed as holding, that the applicant is entitled of right to be present in person or by counsel at the taking of the testimony, or to be informed of the nature thereof, while it is being taken.* In this respect we do not find that the investigation and proceedings before the officers at Sumas and at Seattle in the present case were conducted in such a manner as to deprive the applicant of due process of law. *Nor, in the light of the record, are we able to assent to the conclusion reached by the trial court that the officers who conducted the examinations acted in a partial or arbitrary manner, or abused the discretion reposed in them, or acted upon improper testimony, or*

failed to conduct the investigation according to law and the rules of the department, or that the applicant was denied a fair opportunity to produce his testimony." (Emphasis ours.)

United States ex rel. Buccino et al. v. Williams, Com'r. of Immigration (C. C., S. D. N. Y., 1911), 190 Fed. 897, is directly in point. A writ of habeas corpus was sued out by the relators, who were Italian aliens seeking to enter the United States and who were held by the immigration authorities for return to the country from whence they came. The board of special inquiry, with three inspectors sitting, held that they were liable to become public charges and ordered their deportation. An appeal was taken to the Secretary of Commerce and Labor, who affirmed the decision of the board of special inquiry. Subsequently, for some reason not apparent, a rehearing was ordered before three inspectors other than those who had composed the first board of special inquiry. They called the aliens before them, heard testimony, and reached the same decision as the first board had reached. This latter finding was transmitted to the Secretary of Commerce and Labor who approved it. It was urged that the hearing before the board of special inquiry was unfair because the aliens had been denied the privilege and right to appear by counsel. Bearing upon this contention, Circuit Judge Lacombe said (p. 899):

"No authority is cited which sustains the proposition that upon the examination of an alien arriving in this country by the board of inspectors he is entitled to be presented by counsel. In Ex parte Loung June (D. C.), 160 Fed. 251, and in Re Tang Tung (D. C.), 161 Fed. 618, the relators were contending that they were native born citizens. In Glaves v. Williams,

> 190 Fed. 686 (C. C. S. D. of N. Y., Feb. 3, 1911), the question was not passed upon. In Boxny v. Williams, 185 Fed. 598, an attempt was being made to deport aliens who had been permitted to enter and had lived here for years. There is nothing in the statute which calls for the presence of counsel at the examination of aliens preliminary to admission; nothing to indicate that it was the intent of Congress that these investigations in hundreds of thousands of cases touching the qualifications of an alien seeking to enter were to be conducted as trials in court, with counsel present to represent the alien, witnesses called to testify, and elaborate examination and cross-examination of them. On the contrary, Congress relegated this question to administrative boards who might act summarily and expeditiously, and, to provide against an abuse of their discretion, accorded to the alien a right to appeal to the Secretary of Commerce and Labor. Nor do the rules provide for the presence of counsel at such examinations."

The court appears to distinguish *Ex parte Loung June, supra,* and *Re. Tang Tung, supra,* from the case before it on the ground that, in those cases, United States citizenship was asserted by the relators. However, reference to *Ex parte Loung June, supra,* shows that the question before the court was whether an order of a United States Commissioner was *res judicata.* The statements in the court's opinion regarding the presence of counsel referred to the prior hearing before the United States Commissioner and not to a hearing before a board of special inquiry. Moreover, the decision was reversed on appeal. *Cf.* 171 Fed. 413. The case of *Re. Tang Tung, supra,* may be disposed of by referring to the decision of the

Supreme Court in 223 U. S. 673. Neither of those cases held that an applicant for admission who asserted citizenship was more entitled to counsel at a hearing before a board of special inquiry than any other applicant seeking admission to this country or that either class of applicant to this country was entitled to counsel at a hearing before such board.

In *United States ex rel. Falco v. Williams, Immigration Com'r.* (C. C., S. D. N. Y., 1911), 191 Fed. 1001, a writ of habeas corpus was sued out by an alien immigrant, who was an Italian subject seeking admission to the United States. The board of special inquiry had excluded him as a person likely to become a public charge. A later hearing was held before another board of special inquiry, composed of different inspectors, which unanimously reached the same conclusion as the first board of special inquiry. An appeal was taken to the Secretary of Commerce and Labor, who affirmed the decision of the board of special inquiry and ordered the deportation of the alien. Among other things, the relator contended that he was not represented by counsel at the hearing before the Board of Special Inquiry. The court, speaking through Circuit Judge Lacombe, rejected this contention and stated (p. 1002):

> "A similar objection was disposed of in re Buccino, 190 Fed. 897 (October, 1911)."

In the case of *United States ex rel. Ivanow, et al. v. Greenawalt, U. S. Immigration Com'r.* (D. C., E. D. Pa., 1914), 213 Fed. 901, the court, after holding that the Congress may define and regulate the admission of aliens into the United States and prescribe the conditions upon which the privilege of admission may be enjoyed and that

the Congress may commit to any official, department or tribunal, executive or judicial, the determination of any questions of fact or otherwise upon which the admission of aliens may depend and may prescribe within what time, in what manner, and by whom any decisions made may be reviewed, stated (p. 905):

> "A further point is made of the partial exclusion of counsel from the hearings held by the immigration authorities. It is due both to the government officials and to counsel to have the fact appear of record that this exclusion, so far as it was enforced, was not personal to counsel nor peculiar to this case. There was no exclusion except to the extent that the general regulations of the department require. It is sufficient to say that in this there was no deprivation of any legal right. There is no act of Congress conferring the legal right of representation, and the constitutional right is given only in criminal prosecutions. Anyone familiar with the history of our race knows what a struggle was made to secure this right even in criminal cases, and, whatever views he may entertain as to the abstract justice of its denial in other proceedings, he would scarcely claim that by this a judicial question was fairly raised."

In *United States ex rel. Albro v. Karnuth, Dist. Director of Immigration* (D. C., W. D. N. Y., 1927), 31 Fed. (2d) 785, affirmed 279 U. S. 231, Rule 11 of the Immigration Rules of March 1, 1927, denying the right of counsel before a Board of Special Inquiry to an alien applying for admission, was held not invalid as denying due process of law to such alien. The court held that, while such rule was not expressly authorized by statute, it is within the general powers conferred on the administra-

tive department. Addressing itself to the right of aliens to be represented by counsel at hearings before a board of special inquiry in an exclusion proceeding, the court said (pp. 787-788):

> "Since many aliens, not of Canadian birth or citizenship, arrive daily from Canada, who labor in this country, especially in the border cities, and who likewise have been refused counsel at hearings, under rule 11, the question of the right to exclude counsel will be considered. Rule 11 of the Immigration Rules of March 1, 1927, reads as follows:
>
> " 'Hearings before the boards shall be separate and apart from the public; but the aliens may have one friend or relative present after the preliminary part of the hearing has been completed, provided—
>
> " '1. That such friend or relative is not and will not be employed by him as counsel or attorney.'
>
> "This rule, or a similar rule, has several times been before the courts for construction in this circuit. In U. S. v. Williams (C. C.), 190 F. 897, for example, the aliens, on their examination preliminary to admission, were refused counsel, and Judge Lacombe ruled that the statute did not authorize the presence of counsel at exclusion hearings; that, where aliens had entered and had resided here, they occupied a different status, but that Congress evidently did not intend that the qualifications of aliens intending to enter the United States should be tested by trials calling for the presence of counsel to represent them. * * *
>
> "See, also, U. S. ex rel. Falco v. Williams (C. C.), 191 F. 1001, U. S. ex rel. Chin Fook Wah v. Dunton (D. C.), 288 F. 959, and U. S. v. Greenewalt (D. C.), 213 F. 901. The relators did not ask to have

a friend or relative present as permitted by the regulation under which the hearing was conducted and, as the order or regulation expressly forbids the aid of counsel, there has been, in my opinion, no deprivation of any legal or constitutional right. The hearing was purely inquisitorial, without its having any relation to a criminal examination or investigation. The entry or admission of aliens into the United States, as said in the Greenawalt case, is a high privilege bestowed, and not a legal right, and Congress has unquestionably the power to delegate officials or nonjudicial tribunals to exercise functions of a judicial or administrative character for the purpose of insuring effective compliance with the immigration laws including the deportation of aliens who have unlawfully entered or their exclusion at the boundary. It is not within the province of this court to attempt to control or interfere with the determination of such officials or tribunals save only to protect aliens from the abuse of the discretion of administrative boards by way of habeas corpus.

"But it is strongly urged that the enforcement of rule 11 is nothing less than a denial of due process of law and that it is in conflict with rule 18 which permits the presence of counsel in deportation proceedings. I discover no conflict or inconsistency since a distinction with relation to proceedings against aliens domiciled in the United States and aliens stopped at the border for summary examination as to their right to enter is believed to be a proper exercise of procedure (U. S. v. Williams, *supra*), and the power to make such an order or regulation was not beyond the power delegated by Congress to the Bureau of Immigration.

* * * * * * * * *

"Beyond this, however, the department, which is charged with the enforcement of the Immigration Act, has the right, and, indeed, it is its duty, to prescribe orders, regulations, and rules, not only with relation to the details of procedure, but any fair and reasonable rule or method which will enable effective enforcement of the statute. If the prescribed regulation is not in conflict with the Immigration Act, it certainly falls within the scope of official duty to establish it, even though it is not specifically indicated as to the details. U. S. v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563; U. S. v. Birdsall, 233 U. S. 231, 34 S. Ct. 512, 58 L. Ed. 930. It seems to me plain that a rule or order to expedite inquiries of aliens, or hearings before a Special Board of Inquiry, at the border, to summarily ascertain the qualifications of aliens desiring to enter the United States, should not match judicial trials, or be conducted with similar procedural rules, and therefore the suggestion of deprivation of due process of law is not believed applicable, although due process of law, if a fair hearing is not accorded, may be tested on writ of habeas corpus."

Brownlow, U. S. Immigrant Inspector v. Miers (C. C. A. 5, 1928), 28 Fed. (2d) 653, involved precisely the same issue as the instant case is concerned with and decided such issue, at least for the United States Courts in the Fifth Circuit, in favor of the Government. Miers, an alleged infant alien, entered the United States as a stowaway on January 23, 1927. He was without credentials and was taken into custody by the immigration authorities. On May 19, 1927, a board of special inquiry accorded the alleged alien a hearing to determine his right to enter

the United States and ordered his exclusion. Miers appealed to the Secretary of Labor, who affirmed such decision. Subsequently, the alien filed a petition praying for a writ of habeas corpus, predicating his right to relief upon two propositions:

> (1) That his hearing before the board of special inquiry was unfair because he was denied the presence of a friend or relative as prescribed by the immigration law, because his written application to be heard by counsel before the board of special inquiry was denied, and because the board of special inquiry did not summon a witness whose testimony might have shed some light on the case; and
>
> (2) That the Government did not establish his alienage and did not show that he was not entitled to remain within the borders of this country.

After it had overruled a motion to strike the petition for writ of habeas corpus, the District Court adjudged that the hearing before the board of special inquiry had been unfair because Miers had not been permitted to have his attorney present at such hearing. The court declared the order of the board of special inquiry null and void and directed that Miers be held in the custody of the immigration authorities pending a hearing by a board of special inquiry in accordance with the immigration laws. The respondent immigration inspector, Brownlow, perfected an appeal in due course to the Circuit Court of Appeals, Fifth Circuit. The two questions presented on such appeal were:

> (1) Was Miers denied due process of law because he was not allowed the privilege of counsel when his right to enter the United States was heard before an administrative board?

(2) Was there an abuse of discretion by the administrative board in arriving at the decision that Miers was an alien and not authorized to enter this country in that there was no evidence adduced before such board that he was an alien?

The Circuit Court of Appeals, Fifth Circuit, reversing the judgment of the District Court in *Brownlow v. Miers,* held that the denial, under Rule 11 of the Immigration Rules of March 1, 1927, of the right of counsel before a board of special inquiry to an alien applying for admission did not render such hearing unfair or violate the due process of law requirements of the Constitution. In discussing this point, the court said (pp. 656-658):

"Congress, of course, has full and plenary power in dealing with the admission of aliens into this country, and might, if it saw fit, exclude them entirely. In the Act of February 5, 1917 (39 Stat. 874), it dealt at length with the matter and we think, recognizing the difficulties with which the immigation officers would be confronted, provided and intended to authorize different methods and procedure for handling cases, where the applicants were attempting to enter, from those of persons who had already entered and were sought to be deported, regardless of the manner of their getting into the country. In the first place, the law deals with two classes of aliens in separate sections. As to those seeking admission, it provides for expeditious and summary hearings, to the end that the thousands of immigrants coming be-

fore the department each year may be specially disposed of, with the idea, not only of permitting the machinery to function, but in the interest of the persons themselves, who must be held or put under heavy bail until their cases are decided, as well as the vessels, who have to bear the expense of returning aliens to their ports of departure, if excluded.

"In the concluding portions of section 16 of the Act of 1917 (8 U. S. C. A., Sec. 152) it is provided:

" 'Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Secretary of Labor is permitted by this act, the alien shall be so informed *and shall have the right to be represented by counsel or other adviser on such appeal.* * * *'

"The procedure for handling cases of persons arriving and seeking admission is found in section 17 (8 USCA, Sec. 153), as follows:

" 'That boards of special inquiry shall be appointed by the commissioner of immigration or inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immigrant may have

one friend or relative present under such regulations as may be prescribed by the Secretary of Labor. * * * the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner General of Immigration to the Secretary of Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Secretary of Labor. * * *'

"Section 23 (8 USCA, Secs. 102, 108) defines the power of the Commissioner General of Immigration as follows:

" 'That the Commissioner General of Immigration shall perform all his duties under the direction of the Secretary of Labor. Under such direction he shall have charge of the administration of all laws relating to the immigration of aliens into the United States, * * * shall establish such rules and regulations * * * and shall issue from time to time such instructions not inconsistent with law, as he shall deem best calculated for carrying out the provisions of this Act and for protecting the United States and aliens migrating thereto from fraud and loss. * * *'

"Section 19 (8 USCA, Sec. 155) applies to those who have already entered, but are sought to be deported. It reads:

" 'That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * * In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final.'

"It will be noted that there is no attempt to provide in detail for the method of hearing the class of cases arising under the last quoted section of the Act. On the other hand, in those above quoted with respect to persons seeking admission, as before stated, Congress goes into very great detail and provides for prompt action. In doing this, it has itself indicated the instance in which the applicant shall have the right to counsel; *i. e.,* before the Secretary of Labor. See section 16 above cited. However, notwithstanding the minute detail of section 17 for a summary hearing, it not only does not give the right to counsel, but we think, in the light of the specific provision in section 16, coupled with the permission to 'have one friend or relative present,' reasonably excludes the idea that counsel should be permitted. The department has so construed it for years and accordingly has prescribed rules to govern at such hearings dis-

tinct from those on appeal to the Secretary of Labor, and in ordinary deportation cases. * * *

"In view of the specific provision for counsel on appeal in section 16 of the Act, we think the issue might be disposed of under the maxim *'Expressio unius est exclusio alterius.'* However, we pitch our conclusion upon the proposition that the hearing was not unfair because of the denial of counsel. One 'knocking at the door' does not enjoy the protection of the provision of the Fourteenth Amendment with regard to counsel, which in the first place applies only to a criminal case. The courts in such cases merely have jurisdiction to inquire and determine whether the proceedings before the administrative department of the government have been fair and not denied to the applicant any of the rights and privileges dictated by common justice. U. S. ex rel. Buccino *et al.* v. Williams, Commissioner of Immigration (C. C.), 190 F. 897; Quon Quon Poy v. Johnson, Commissioner, 273 U. S. 352, 47 S. Ct. 346, 71 L. Ed. 680." (Emphasis ours.)

In *United States ex rel. Chew Deck v. Commissioner of Immigration and Naturalization, Port of New York,* (D. C., S. D. N. Y., 1936), 17 Fed. Supp. 78, affirmed without opinion 86 Fed. (2d) 1020, certiorari denied 300 U. S. 666, a writ of habeas corpus was sued out by the relator who, alleging that he was the son of an American-born Chinese, claimed the right to enter the United States as the son of a native-born American citizen. In dismissing the writ, the court held that a person claiming the right to enter the United States as the son of a native-born American citizen is not entitled to a trial *de novo* by the court; that the immigration authorities, in passing

on the claimed right to enter the United States as a son of an American-born Chinese, are not bound by ordinary rules of evidence prevailing in court trials of common law actions; that the immigration authorities' use of discrepancies as a method of testing the value of testimony, where a Chinese person claims the right to enter the United States as the son of an American-born Chinese, is proper; and that the Labor Department is vested with power to make the rule, assailed by the petitioner, regarding the presence of counsel at a hearing before immigration authorities or the taking of testimony in the absence of such counsel.

The case of *United States v. Sing Tuck* (1894), 194 U. S. 161, 168, touches upon the pertinent principle of law. The Supreme Court, dealing with a Chinese person, used the following expression (pp. 168-169):

> "Considerations similar to those which we have suggested lead to a further conclusion. Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of Congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial."

Under the Chinese Exclusion Act, a preliminary examination was made by an inspector whose actions were subject to approval of a board of review, with ultimate right of appeal to the Department. In the case at bar, a preliminary inspection is made by an inspector who, if he is not convinced of the applicant's right to enter the United

States, must refer the case to a board of special inquiry for further consideration.

In *United States v. Sing Tuck, supra,* the majority opinion of the Supreme Court found Rule 6 of the Immigration Rules to be reasonable. That rule provided:

> "Immediately upon the arrival of Chinese persons at any port mentioned in Rule 4 it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to adopt suitable means to prevent communication with them by any persons other than officials under his control, to have said Chinese persons examined promptly, as by law provided. touching their right to admission and to permit those proving such right to land."

Under the provisions of Rule 6, it will be seen that the applicant for admission is held incommunicado. The Supreme Court also held Rule 7 of the Immigration Rules to be a reasonable regulation. Under the terms of that rule, if a Chinese applicant was adjudged to be inadmissible after a hearing separate and apart from the public and in the present of Government officials and only designated witnesses, he shall be advised of his right to appeal and then his counsel shall be permitted to examine but not to make copies of the evidence. The Supreme Court, in approving these rules, said (p. 170):

> "The whole scheme is intended to give as fair a chance to prove a right to enter the country as the necessarily summary character of the proceedings will permit."

The case of *Quon Quon Poy v. Johnson, Commissioner* (1927), 273 U. S. 352, held that an applicant for admission to the United States has no constitutional right to a judicial hearing of his claim that he was born in and is a citizen of the United States. In that case, a Chinese boy, about 15 years of age, applied for admission to the United States and based his right to such admission on the claim that he was a foreign-born son of a native-born American citizen. Following the preliminary investigation by an immigration official, his claim was heard by a board of special inquiry, acting under the provisions of the Immigration Act of 1917. The board of special inquiry ordered the applicant's exclusion. This order was affirmed on appeal to the Secretary of Labor, after the finding of the board of special inquiry had been approved by the board of review. Habeas corpus proceedings were instituted and, on hearing, the writ was discharged and the petitioner was remanded to the custody of the Commissioner of Immigration. Under the provisions of section 238 of the Judicial Code, a direct appeal was taken to the Supreme Court of the United States. It was maintained that the Chinese boy had been denied a fair hearing and that the proceedings were irregular because no friend or relative of the applicant was present at the hearing, in accordance with the provisions of section 17 of the Act of February 5, 1917. However, the record showed that the petitioner, after being informed of his right to have a relative or friend present at such hearing, waived the privilege.

In *Quon Quon Poy v. Johnson, supra,* no contention was made that the hearing before the board of special inquiry was unfair or irregular because of the absence of counsel on behalf of the applicant. It appears from the opinion in the case that counsel for the petitioner was not present at such hearing. The following statement is found in the opinion of the Supreme Court (pp. 355-356):

> "At the commencement of the hearing before the Board the petitioner was informed of his right to have a relative or friend present, and stated that he did not desire to avail himself of this right and was willing to proceed with the hearing. He was also informed that the previous testimony given by himself and his alleged father and brother would be made a part of the proceedings before the Board; to which he made no objection. The petitioner was then further examined by the Board. After a postponement for the purpose of obtaining a report as to the physical condition of the petitioner, the Board resumed its hearing, the petitioner being again present; and after consideration of the entire testimony, being of the opinion that his relationship to Quon Mee Sing had not been reasonably established, voted to accord him five days in which to submit additional evidence. *Notice of this was sent to the attorney representing the petitioner—who had not been present at any of the proceedings—and he replied that the petitioner had no further testimony to offer."* (Emphasis ours.)

It may be concluded that Quon Quon Poy's counsel recognized that the rule preventing his appearance before the board of special inquiry was a reasonable regulation, since he did not contend in the habeas corpus proceeding that the hearing was unfair because he had not been permitted to be present. The Supreme Court seemingly sanctioned such procedure since it held, after it noted the absence of counsel from the hearing before the board of special inquiry, that the proceedings conformed to due process of law. See:

Ex parte Chin Quock Wah (D. C., W. D., Wash., 1915), 224 Fed. 138;

Ex parte Chin Hing (D. C., W. D., Wash., 1915), 224 Fed. 261.

It may be pointed out that in *Nishimura Ekiu v. United States* (1892), 142 U. S. 651, the Supreme Court upheld the constitutionality of one of the older immigration acts and sanctioned rules and regulations which, if they are compared with the rule under attack in the instant case, would seem harsh and unjust. The court said (p. 660):

> "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are due process of law."

Professor Thomas Reed Powell, in an article on the *"Conclusiveness of Administrative Determinations in the Federal Government,"* clearly stated the necessity for sumptuary rules and regulations and the reasons of public policy underlying them. He said:

> "The decisions of questions seriously affecting private rights must be committed to some fallible tribunal. Due process of law can rightfully demand no more than that the procedure devised for reaching the decision give to the individual every opportunity to establish his rights, consistent with maintaining the orderly and efficient administration of government. The public welfare is entitled to as much consideration as the private right; and the exigencies of national well-being have been rightfully deemed an important factor in determining whether the final decision of an administrative board is due process of law. The courts have regarded the cases, not as isolated examples of governmental activity, but as instances of many similar ones, and have in all cases been influenced by the effect a contrary rule would have on the work of the judiciary and the attainment of the end which the legislature and the court deemed essential to the public welfare.
>
> "But starting with the presence of a horde of immigrants on the frontier, whom the proper authority in the government has determined we must exclude, if our national ideals are to be preserved * * *, the demands of public necessity collide with the possible infringement of private right, and, rightly or wrongly, has been determined to be law in the United States that the exigencies of the national welfare are to have the right of way." (Political Science Review, August, 1907.)

Finally, it must be reiterated that the only cases bearing upon the right of an alien seeking admission to the United States to have counsel present at the time of hearing before a board of special inquiry hold that the denial of counsel at such time does not render the hearing unfair. This administrative practice has long been followed and has never been successfully challenged. This long-established practice of the Department should not be lightly overthrown:

United States v. Baruch (1912), 223 U. S. 191;

United States v. Healey (1895), 160 U. S. 136, 141, 145;

20 *Op. Atty. Gen.* 358, 362;

21 *Op. Atty. Gen.* 349, 352.

The regulations governing hearings before a board of special inquiry were promulgated by an executive department of the Government, to which the Congress has entrusted enforcement of the immigration laws. The judiciary should not interfere in the practical workings of these executive agencies unless it should appear, beyond a peradventure of a doubt, that these regulations constitute a denial of due process of law to the immigrants. This long-standing practice should bear great weight with the courts. Any doubt in this case should be resolved in favor of the administrative agencies:

Robertson v. Downing (1888), 127 U. S. 607;

U. S. v. Cerecedo Hermanos y Compania (1908), 209 U. S. 337.

The rights of thousands of applicants for admission to the United States have been determined under these regulations. The ruling of the District Court in the case at bar would seem to be in error, and its enforcement would seriously impair the administrative machinery for the enforcement of the immigration laws.

Conclusion.

It having been determined affirmatively that the executive officers have acted in a lawful and proper way in arriving at their decision: that they did not abuse the discretion lodged with them; that there was no erroneous application of the law, and the order of exclusion was not arbitrarily issued, the appellant respectfully contends that the court below erred, in granting the Writ of Habeas Corpus and ordering the appellee discharged from the custody of the Immigration and Naturalization Service.

It is therefore respectfully requested that the order of the court below in discharging the appellee be REVERSED with direction to remand the appellee to the custody of the Immigration authorities.

Respectfully submitted,

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